No. _____

In the

Supreme Court of the United States

October Term, 1992

WOODBURY PLACE PARTNERS,
a Minnesota general partnership,

Petitioner,

v.

CITY OF WOODBURY,
a Minnesota Municipal Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE STATE OF MINNESOTA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES A TEMPORARY DEVELOPMENT MORATORIUM THAT DENIES A LANDOWNER ALL ECONOMICALLY VIABLE USE OF ITS LAND DURING THE MORATORIUM CONSTITUTE A CATEGORICAL COMPENSABLE TAKING UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

THE PARTIES

Petitioner is a Minnesota General Partnership.

Respondent is a Minnesota Municipal Corporation.

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Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1192 (1967) 10

Sax, Takings and the Police Power, 74 Yale L.J. 36, 60 (1964) 10

Williams, Smith, Siemon, Mandelker & Babcock, The White River Junction Manifesto, Vermont Law Review, Vol. 9, No. 2 (1984) 10

No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1992

WOODBURY PLACE PARTNERS,
a Minnesota General Partnership
Petitioner,

vs.

CITY OF WOODBURY,
a Minnesota Municipal Corporation
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT TO THE STATE OF MINNESOTA COURT OF APPEALS

Petitioner respectfully asks that a Writ of Certiorari issue to review the decision of the State of Minnesota Court of Appeals filed on November 17, 1992. Discretionary review was denied by the Minnesota Supreme Court in an Order filed January 15, 1993.

OPINIONS BELOW

The Minnesota Supreme Court's Order denying review of the Minnesota Court of Appeals Decision is unreported. The decision of the Minnesota Court of Appeals is reported at 492 N.W.2d 258 (Minn. Ct. App. 1993). The Findings of Fact, Conclusions of Law and Order for Judgment of the State District Court are not reported. The Minnesota Supreme Court's Order, Court of Appeal's decision and State District Court's Findings of Fact, Conclusions of Law, Order for Judgment and Judgment are reprinted in the Appendix and are cited herein as App. A-1 through App. A-38.

JURISDICTION

The Minnesota Supreme Court's Order denying review of the Minnesota Court of Appeals decision was filed on January 15, 1993. This Court has jurisdiction to review the Minnesota Court of Appeals decision by Writ of Certiorari pursuant to 28 U.S.C. §1257.

STATUTES AND RULES INVOLVED

U.S. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy

> of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This Petition presents the question of whether an interim development moratorium, which denies a property owner all economically viable use of its property, constitutes a categorical compensable taking under the Fifth Amendment of the United States Constitution.

At all relevant times, Petitioner was the owner of thirteen acres of vacant, unimproved property within Respondent's corporate boundaries ("Property"). In February 1988, Petitioner submitted an application to Respondent for approval of a commercial development on the Property. Respondent tabled the Petitioner's development application and requested that Petitioner submit a revised development plan consistent with proposed roadway improvements adjacent to the Property. (Stipulated Findings of Fact (Petitioner's version) no. 19.) Petitioner revised its development application to accommodate the Respondent's proposed redesign of adjacent roadways. (Stipulated Findings of Fact (Petitioner's version) no. 19.)

On March 23, 1988, Respondent adopted a six-month moratorium ("Moratorium") on development of property including Petitioner's Property. The Moratorium states, in part:

> No application for subdivision approval, site plan review, amendments to the comprehensive plan or rezoning should be accepted or considered in the area designated herein during the time that this ordinance is in effect.

The Moratorium included a provision allowing a landowner to apply for a variance.

On June 8, 1988, the Respondent made its final decision on Petitioner's application by tabling all further action on the application until termination of the Moratorium. Respondent also denied Petitioner's request for a variance from the Moratorium. (Stipulated Findings of Fact (Petitioner's version) no. 36.)

On three separate occasions, the Respondent extended the Moratorium for consecutive six-month terms. (Stipulated Findings of Fact (Petitioner's version) no. 41.)

On February 22, 1989, Respondent denied Petitioner's second request for a variance from the Moratorium. (Stipulated Findings of Fact (Petitioner's version) no. 41.) The Moratorium was terminated on March 23, 1990, two years to the day from its adoption.

Petitioner sought an Alternative Writ of Mandamus in July 1988, directing Respondent to institute condemnation proceedings for a temporary taking of the Property during the two-year Moratorium. In order to avoid a lengthy trial, the parties stipulated to findings of fact, including that Petitioner was denied all economically viable use of the Property for the two years the

Moratorium was in effect. (Stipulated Findings of Fact (Petitioner's Version) no. 47).[1]

The state District Court heard oral argument on the sole issue in the case: whether the Moratorium constituted a compensable temporary taking of the Property. The District Court ruled that the Moratorium effected a compensable temporary taking (App. A 2-3). The District Court's decision was based on this Court's holdings in *First English Evangelical Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), and *Agins v. Tiburon*, 447 U.S. 255 (1980) (App. A-6).

Respondent appealed the District Court's decision to the Minnesota Court of Appeals. The Court of Appeals reversed the District Court. The Minnesota Supreme Court denied discretionary review of the Minnesota Court of Appeals' decision.

Citing *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), the Minnesota Court of Appeals recognized that a "categorical taking" occurs when a regulation "denies all economically beneficial or productive use of land," but nevertheless held that a two-year loss of use did not rise to the level of a categorical taking.[2] The Minnesota Court of Appeal held that:

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[1]In *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), this Court held that the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests or *denies an owner economically viable use of his land*" (emphasis added).

[2]The Court of Appeals remanded the case to the District Court for submittal of evidence to determine if the Moratorium effected a taking pursuant to the factors set forth in *Penn Central Transportation*

> When measured against the value of the property as a whole, rather than against only a two-year time frame, the moratorium did not deny the partnership "all economically viable use" of its property.

(App. A-33-34)

The Court of Appeals acknowledged that no case specifically addressed the dimension of time as it applies to the totality of a taking. The Court of Appeals determined that loss of present use did not constitute denial of all economically viable use as defined in *Lucas v. South Carolina Coastal Council*, because the Property had future use.

REASONS FOR GRANTING THE WRIT

SUMMARY

In 1922, Justice Oliver Wendell Holmes originated the concept that government regulation, like physical appropriation, may effect a Fifth Amendment taking of property:

> while property may be regulated to a certain extent, if it goes too far it will be recognized as a taking.

Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922).

Company v. City of New York, 438 U.S. 104 (1978).

This Court has painstakingly sought to define Holmes' pronouncement in recent years. *Lucas v. South Carolina Coastal Counsel*, 112 S. Ct. 2886 (1992);[3] *First English Evangelical Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980) and *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978). Those cases provided the Court with the opportunity to offer "insight into when, and under what circumstances, a given regulation would be seen as going 'too far' for purposes of the Fifth Amendment." *Lucas*, 113 S.Ct. at 2893.

The issue presented in this Petition naturally follows previous regulatory taking cases as it will provide equally important "insight" into when and under what circumstances a regulation effects a *temporary* taking. This Petition presents the Court with a question that has never been before the Court. Specifically, this Petition gives the Court the opportunity to decide whether a temporary regulation which denies a property owner all present economic use of its property, constitutes a categorical taking as defined in *Lucas v. South Carolina Coastal Council*.

The issue is squarely presented as a matter of law because the parties stipulated that the two-year Moratorium denied Petitioner all economically viable use of the Property for two years. (Stipulated Findings of Fact (Petitioner's Version) no. 47). Presented with that

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[3]The *Lucas v. South Carolina Coastal Council* decision was issued during the briefing schedule before Minnesota Court of Appeals.

stipulation, the Minnesota Court of Appeals held that no compensable temporary taking occurred. The Court of Appeals held that denial of all economically viable use of property, for a *definite period of time*, does not constitute a taking because the economic burden must be measured against the value of the Property "as a whole," not just the two-year segment of time (App. A-33). The Minnesota Court of Appeals based its decision on *Penn Central Transportation Company*, 438 U.S. at 130-131 and *Keystone Bituminous Coal Association v. DeBenedictis*, cases predating both *Lucas v. South Carolina Coastal Council* and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.

This Court has not defined the "property interest" against which the loss of value is to be measured. While that question remains unclear as to severance of physical segments of property, the Court has *never* spoken to the issue of whether the temporal strand of the bundle of rights that compose property should be isolated for the purpose of determining whether denial of all economically viable use occurs.

With widespread use of governmental growth management techniques (i.e., moratoria), which are designed to stop or stall development, the novel issue presented in this Petition is timely, and of vital importance and great interest to all landowners and planning authorities.

The Decision Of The Minnesota Court Of Appeals Raises An Important Question Of Federal Law Which Should Be Settled By This Court Without Delay

In *Keystone Bituminous Coal Association v. DeBenedictis*, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, and *Lucas v. South Carolina Coastal Council*, petitions for certiorari were granted because of the novelty and importance of the questions presented as they related to the Court's desire to define when and under what circumstances a regulation effects a taking under the Fifth Amendment to the Constitution.[4] The issue presented here is both unresolved and novel, and as important as those presented in *Keystone Bituminous Coal Association v. DeBenedictis*, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* and *Lucas v. South Carolina Coastal Council*.

In order to answer whether a moratorium constitutes a compensable temporary taking, the Court must define the "property interest" against which the loss in value resulting from the regulation is to be measured. With temporary regulations the Court must consider whether present use and future uses are separate strands in the bundle of rights that compose property, or whether

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[4]The Fifth Amendment (takings clause) provides "nor shall private property be taken for public use, without just compensation" and it applies to the states through the Fourteenth Amendment. *See Chicago BQ&R Co. v. Chicago*, 166 U.S. 226, 41 L.Ed. 979, 17 S.Ct. 581 (1897).

they are to be viewed together.[5] No case has addressed a regulation's duration as it applies to the totality of a taking.

While the Court has *never* faced the issue regarding segmentation of time as a component of property for regulatory takings analysis, there appears to be no consensus on the issue of segmentation of physical segments of property versus defining the "parcel as a whole."[6] *Penn Central Transportation Company*, 438 U.S. at 130-131 (1978). Segmentation of the physical strand that composes a parcel of property was first addressed in *Penn Central Transportation Company v. New York:*

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely

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[5]This issue has ignited great debate amongst land-use scholars. *See*, Sax, Takings and the Police Power, 74 Yale L.J. 36, 60 (1964); Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1192 (1967); Bozung and Alessi, Recent Developments in Environmental Preservation and Rights of Property Owners, The Urban Lawyer Vol. 20, No. 4 (1988); Williams, Smith, Siemon, Mandelker & Babcock, The White River Junction Manifesto, Vermont Law Review, Vol. 9, No. 2 (1984).

[6]In *Penn Central Transportation Company v. New York*, the dissent did not agree with the "parcel as a whole" formulation. In response to the Court's formulation the dissent opined that "the Court must define the particular property unit that should be examined." *Penn Central Transportation Company*, 438 U.S. at 149, n. 13 (Rehnquist J., dissenting).

> abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights in the parcel as a whole . . .

Penn Central v. Transportation Company, 438 U.S. at 130-131.

The Court in *Keystone Bituminous Coal Association v. DeBenedictis*, focused on defining "property interest." In that case, the Court held that the Pennsylvania Subsidence Act, which prohibited the mining of more than 50 percent of coal beneath public buildings, dwellings or cemeteries, did not constitute a facial taking. Just as the Minnesota Court of Appeals broadly defined the temporal strand in this case, the Court broadly defined physical segments of property, ultimately holding that "as a whole" the owner had not been denied all economically viable use because it had use of a portion of the property. *Keystone Bituminous Coal Association*, 480 U.S. at 497, *quoting*, *Penn Central Transportation Company*, 438 U.S. at 130-131.

The dissent in *Keystone Bituminous Coal Association v. DeBenedictis* opposed the Court's perpetuation of the *Penn Central Transportation Company* "parcel as a whole" formulation. Recognizing the vagueness of the *Penn Central Transportation Company* "parcel as a whole" language, the dissent concluded:

> The Court gave no guidance on how one is to distinguish a "discrete segment" from a single parcel.

Keystone Bituminous Coal Association, 480 U.S. at 517, n. 5 (Rehnquist J., dissenting).

In the same term, the Court decided the seminal case on a property owner's right to compensation for temporary taking of property. *See*; *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*. The Court held that where the governmental regulation works a taking of all use of property, no subsequent action relieves the government of the duty to compensate the landowner for the period during which the taking was effective. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, provides support for the State District Court's holding in this case (that the Moratorium effected a compensable taking), but did not present the Court with the opportunity to determine whether the temporal strand of property is to be severed when defining the "property interest" that has been denied use as a result of government regulation.[7]

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[7]Justice Stevens, in his *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, dissent, recognized that treatment of the temporal strand of property was an issue that needed clarification:

> Regulations are three-dimensional; they have depth, width and length ... Finally, and for purposes of this case, essentially, regulations set forth the duration of the restrictions. It is obvious that no one of these elements can be analyzed alone to evaluate the impact of the regulation, and hence to determine whether a taking has occurred.

First English Evangelical Lutheran Church of Glendale, 482 U.S. at 330 (Stevens J., dissenting).

In *Lucas v. South Carolina Coastal Council*, the Court again recognized the need to clarify what constitutes "property interest" for regulatory taking purposes. The *Lucas v. South Carolina Coastal Council* Court promulgated a per se categorical rule that a regulation which denies a landowner economically viable use of its land effects a compensable taking without case-specific inquiry or balancing of public interest advanced in support of the regulation. While committing to a categorical rule, it appears the Court believed that the definition of "property interest" remains unclear:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured.

Lucas, 112 S.Ct. at 2894 n.7.

By this footnote, the Court appears to recognize that it has only taken Justice Holmes' proclamation so far, and that further insight into when and under what circumstances a regulation effects a compensable taking is needed. This is especially true of temporary regulations.

Unless the Court defines "property interest" in the temporary regulatory taking context, lower federal and state courts may erode the constitutional principles promulgated by this Court since *Pennsylvania Coal v. Mahon*. Moreover, the categorical formulation set forth in *Lucas v. South Carolina Coastal Council* and the mandate for compensation promulgated in *First English Evangelical*

Lutheran Church of Glendale v. County of Los Angeles will be more difficult to apply.

Resolution of the issue presented in this Petition will provide foundation for future courts to rely on to determine whether temporary regulations effect compensable takings. Most temporary regulations are accomplished through the use of growth management regulations. The government's right to regulate property and a property owner's right to use its property directly conflict when government utilizes growth management controls such as the Moratorium. Traditional subdivision and zoning regulations regulate use and density. Growth management controls are three-dimensional because they add timing to the regulation.

As a result of growth management controls, landowners are forced to maintain the status quo for sake of the community as whole. When there are no uses of property regulated by growth management regulations, the result, as in this case, may be denial of all present use of the property. This case presents the Court with the opportunity to define whether such loss of present use is compensable.

Perpetuation of the constitutional protections granted to property owners by the Takings Clause will exist only if the "property interest" to be measured against the loss in value is defined. The Court has never been presented the case in which it can define the relevant property interest. The posture of this case presents the Court with the opportunity to finally decide the issue, an opportunity the Court has desired since *Pennsylvania Coal v. Mahon*, in 1922.

CONCLUSION

Just as with any police power regulation, the underlying inquiry to determine compensability under the takings clause is whether "some people bear public burdens which in all fairness and justice, should be borne by the public as a whole." *First English Evangelical Lutheran Church of Glendale*, 482 U.S. at 318. This Court has painstakingly balanced those interests in promulgating regulatory taking jurisprudence. This case is the next in the line of cases since *Pennsylvania Coal v. Mahon*, in which the Court can define a landowner's rights under the Takings Clause of the Fifth Amendment.

For the reasons set forth above, a Writ of Certiorari should be granted in this case.

Respectfully submitted,

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APPENDIX

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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF WASHINGTON TENTH JUDICIAL DISTRICT

Woodbury Place Partners, a Minnesota general partnership,
Plaintiff,

File No. CO-88-3249

vs.

FINDINGS OF FACT
CONCLUSIONS OF LAW
ORDER AND ORDER FOR
JUDGMENT

City of Woodbury, Minnesota, a municipal corporation,
Defendant.

The above-entitled matter came on for trial before the undersigned, the Honorable J. E. Cass, Judge of the above-named Court, at the Washington County Government Center, Sillwater, Minnesota, on September 27, 1991.

Anthony J. Gleekel and Christopher Penwell appeared on behalf of Plaintiff. Pierre N. Regnier and James G. Golembeck appeared on behalf of Defendant.

The Court, after considering the arguments of counsel and the memoranda submitted, and based upon all of the files, records and proceedings herein, makes the following:

FINDINGS OF FACT

1. The parties submitted the matter to the Court upon two sets of stipulated facts. Each party agreed as to the accuracy of each set of facts, but objected to the opposing party's set on grounds of relevancy.

2. Plaintiff's set of stipulated facts focus on the fact that Plaintiff was denied all economically viable use of the property from March 23, 1988 to March 23, 1990, as the result of the City of Woodbury's enactment of a moratorium.

3. Defendant's set of stipulated facts focus on the reasonableness of the moratorium enacted by the City of Woodbury. The Court finds the reasonableness of the moratorium to be irrelevant.

4. Plaintiff's version of the Stipulated Findings of Fact, attached, is incorporated herein by reference.

5. Plaintiff has not unreasonably delayed asserting a known right to the prejudice of others.

Based on the foregoing, the Court makes the following:

CONCLUSIONS OF LAW

1. Plaintiff's claim is not barred by the doctrine of laches.

2. The moratorium effected a compensable temporary taking of Plaintiff's land from March 23, 1988

to March 23, 1990.

Based on the foregoing, the Court makes the following:

ORDER

1. A peremptory Writ of Mandamus shall issue directing Defendant City of Woodbury to commence condemnation proceedings against Plaintiff's property involved herein.

2. Plaintiff is awarded its costs and disbursements.

3. Robert Beedle, C. J. Kabis, and Timothy J. McKenzie, with James L. Currell and Robert Lafayette as alternatives in that order, each of whom is a disinterested person and resident of Washington County, Minnesota, are hereby appointed as Commissioners to ascertain and report the amount of damages that were sustained by Plaintiff as a result of the temporary taking described herein. The first meeting of said Commissioners shall be held in the offices of the Court Administrator of Washington County at the Washington County Government Center, Stillwater, Minnesota, on January 15, 1992, at 10:00 a.m. The compensation of each Commissioner is fixed at the sum of $150.00 per day.

4. The Washington County Court Administrator shall mail a copy of this Order to the attorneys for the above-named parties by U. S. mail. Such mailing shall constitute due and proper service of this Order for all purposes.

Based on the foregoing, the Court makes the following:

ORDER FOR JUDGMENT

LET THE JUDGMENT BE ENTERED ACCORDINGLY.

The attached Memorandum is incorporated herein by reference.

Dated: December 16, 1991
Filed: December 18, 1991

J. E. Cass
Judge of District Court

MEMORANDUM

Re: Woodbury Place Partners v. City of Woodbury
Court File No. C0-88-3249

Plaintiff owns property located within the City of Woodbury (the City). Plaintiff submitted an application for a Special Use Permit, approval of preliminary plat, and site plan review to the City on February 16, 1988. The application complied with all applicable zoning and subdivision ordinances, but was inconsistent with proposed roadway improvements. The application was revised to be consistent with these improvements and submitted to the City prior to March 23, 1988. The City council, pursuant to Minn. Stat. Sec. 462.355, subd. 4, on March 23, 1988 adopted a moratorium restricting development within a certain area, including Plaintiff's property. Although the moratorium provided for variances, Plaintiff was twice denied a variance from the moratorium. The moratorium expired on March 23, 1990. Plaintiff commenced this action on August 1, 1988. The only remaining claim is that the moratorium effected a temporary taking of Plaintiff's property, requiring compensation. The parties have stipulated that Plaintiff was denied all economically viable use of the property from March 23, 1988 to March 23, 1990, as a result of the moratorium. The parties have also stipulated that the moratorium was reasonable and necessary to protect the planning process and the health, safety, and welfare of the City's citizens.

The United States Constitution, Amendment 5 and Minn. Const. Art. 1, Sec. 13, state that private property shall not be taken for public use without just compensation. A government regulation which works a

temporary taking upon property is treated the same as if it had been a permanent taking; the landowner is entitled to compensation for his loss of use during the temporary taking. First English Evangelical Church v. Los Angeles County, 482 U.S. 304, 318 (1987). First English involved a situation where a building moratorium was imposed due to flooding. The court held that, assuming the moratorium worked a taking upon the land, Plaintiff was entitled to compensation for that temporary taking. Id. at 322.

The facts of First English are very similar to those presented here, and Plaintiff is entitled to compensation if the moratorium constitutes a taking. There are two situations in which a general zoning law can effect a taking: (1) if the ordinance does not substantially advance legitimate state interests; or (2) if application of the ordinance denies the owner economically viable use of his land. Agins v. Tiburon, 447 U.S. 255, 260 (1990); Parranto Bros. v. City of New Brighton, 425 N.W.2d 585, 590 (Minn. Ct. App. 1988). The parties have stipulated that the moratorium denied Plaintiff all economically viable use of the land. Therefore, under Agins and First English, the moratorium worked a temporary taking of the land for which compensation is owed.

Defendant argues that there can be no taking since the moratorium was implemented under the City's police power and was reasonable in purpose, duration, and scope. It is true that the exercise of a city's police power can properly limit the uses to which property can be put, but it is also true that the exercise of such police power constitutes a compensable taking if it deprives the property of all reasonable use. McShane v. City of

Faribault, 292 N.W.2d 253, 257 (Minn. 1980), citing Euclid v. Amber Realty Co., 272 U.S. 365 (1926); Thompson v. City of Red Wing, 455 N.W.2d 512, 516 (Minn. Ct. App. 1990). Constitutional protections were designed to compensate landowners for otherwise proper interference with their land which amounted to a taking. First English at 315. The moratorium here, although reasonable, deprived Plaintiff of the use of its land, for which Plaintiff is constitutionally required to be compensated.

Dated: December 16, 1991

J. E. Cass
Judge of District Court

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF WASHINGTON TENTH JUDICIAL DISTRICT

Woodbury Place Partners, a Minnesota general partnership,

Plaintiff,

vs.

City of Woodbury, Minnesota, a municipal corporation,

Defendant.

ORDER

The above-entitled matter came before the undersigned, the Honorable J. E. Cass, Judge of the above-named Court, at the Washington County Government Center, Stillwater, Minnesota, on January 27, 1992.

Gerald S. Duffy, W. Christopher Penwell, and Anthony J. Gleekel appeared on behalf of Plaintiff. Pierre N. Regnier and James G. Golembeck appeared on behalf of Defendant.

Based on all of the files and records herein, the Court makes the following:

ORDER

1. Defendant's Motion to amend and for anew trial is DENIED.

2. The parties have stipulated to stay the proceeding pending an appeal on the liability issue. A stay of the proceedings is GRANTED as follows:

a. Six (6) months from the date of this Order, Defendant City shall commence condemnation proceedings pursuant to this Court's Order;

b. Upon commencement of the condemnation proceedings, the parties may commence discovery on the issue of damages;

c. Discovery shall be completed within four (4) months of the filing of the Minnesota Court of Appeals decision on the issue of liability in this matter;

d. The Commissioners appointed by Order of this Court dated December 16, 1991, are hereby discharged from their duties as Commissioners;

e. Upon receipt of this Order, Commissioner Beedle, Kavis, and McKenzie shall submit their bill for services incurred in attending the swearing in ceremony to Pierre N. Regnier, Esq., 2100 Meritor Tower, 444 Cedar Street, St. Paul, Minnesota 55101,

and such bill will then be paid by Defendant.

3. The Washington County Court Administrator shall serve a true and correct copy of this Order by U. S. Mail upon counsel for the above-named parties. Such mailing shall constitute due and proper service of this Order for all purpose.

The attached Memorandum is made a part hereof by reference.

Dated: March 9, 1992
Filed: April 3, 1992

J. E. Cass
Judge of District Court

MEMORANDUM

Re: Woodbury Place Partners v. City of Woodbury
Court File No. C0-88-3249

The parties submitted the above-entitled matter to this Court upon stipulated facts for a determination of liability. The Court, in Findings of Fact, Conclusions of Law, and an Order for Judgment entered on December 18, 1991, concluded that a building moratorium enacted by Defendant effected a compensable temporary taking of Plaintiff's land from March 23, 1988 to March 23, 1990. Defendant has now moved for Amended Findings of Fact, Conclusions of Law, and Order for Judgment under Minn. R. Civ. P. 52.02 or for a new trial under Minn. R. Civ. P. 59.

Defendant's first claim is that the Court erred in finding the reasonableness of the Moratorium to be irrelevant. Defendant claims that the Court ignored First English Evangelical Church v. Los Angeles County, 482 U.S. 304 (1987), the First English remand, First English Evangelical Church v. Los Angeles County, 210 Cal. App. 3rd 1353, 258 Cal. Rptr. 893 (Cal. Ct. App. 1989), cert. denied, 107 L. Ed. 2d 950 (1990) , and all other case law dealing with reasonable moratoria. The logic of First English was not lost upon this Court; it states quite clearly that a landowner is entitled to compensation for any loss caused by a temporary taking. Id. at 318. The court in First English did not determine under what circumstances a temporary taking exists; it assumed there was a taking for purposes of its decision and remanded the case to the state court to determine if a taking had occurred. Id. at 313. First English specifically declined to determine

whether the conclusion that a temporary taking had occurred could be avoided by establishing that the denial of all use was protected under the State's authority to enact safety regulations. Id. First English recognized that temporary takings are no different that permanent takings, Id. at 318, and that the Fifth Amendment is designed to require compensation for government actions which, although proper, amount to a taking. First English does not make an exception for moratoria which are reasonable in scope or duration, although other courts, whose decisions are not binding upon this Court, have done so. This Court has determined that under federal and Minnesota law, a temporary taking occurred. Defendant has not presented any new arguments which would cause this Court to reverse its decision.

Defendant also argues that the court was in error when it stated that the parties had stipulated that the moratorium denied Plaintiff all economically viable use of the land. Apparently Defendant is referring to a statement in the December 16, 1991 Memorandum where the Court did not specifically list the dates of the taking. It is clear from the Order and accompanying Memorandum, however, that the Court was well aware of the fact that Defendant did so stipulate only for the time period of March 23, 1988 to March 23, 1990. See, Stipulated Findings of Fact (Plaintiff's version) No. 47.

Defendant argues that this Court's decision will require government agencies to pay every time there is any delay in issuing a permit to develop land. This moratorium did not involve a delay in the permitting process, however. The moratorium restricted development of all property in the area to allow Defendant time to

complete an access improvement study; it was not in response to Plaintiff's development request and was not a normal delay which Plaintiff should have expected to occur as part of a permitting process.

Defendant's last claim is that Plaintiff's action should be barred by the doctrine of laches. The doctrine of laches will bar a claim if there has been an unreasonable delay in asserting a known right which results in prejudice to others such that it would be inequitable to grant the relief requested. Klapmeier v. Town of Center, 346 N.W.2d 133 (Minn. 1984). Plaintiff here commenced an action on August 1, 1988, alleging in Count III that the moratorium constituted a taking. This was only four months after the moratorium was adopted and two months after Plaintiff had been denied a variance from the moratorium. An Amended Complaint was served on September 19, 1989, requesting declaratory judgment that the moratorium was invalid. No taking was alleged in this Amended Complaint. Plaintiff filed a Note of Issue on February 26, 1990, certifying that the case was ready for trial. An April 27, 1990 Order of this Court allowed Plaintiff to file an Alternative Writ of Mandamus and Second Amended Complaint, which re-alleged the temporary taking claim. The Second Amended Complaint was served on April 26, 1990. The Court finds that Plaintiff did not unreasonably delay asserting a known right; Defendant's Motion is denied.

Dated: March 3, 1992

J. E. Cass
Judge of District Court

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF WASHINGTON — TENTH JUDICIAL DISTRICT

Woodbury Place Partners, a Minnesota general partnership,

Plaintiff,

vs.

City of Woodbury, Minnesota, a municipal corporation,

Defendant.

JUDGMENT

FILE NO. CO-88-3249

The above-entitled matter came on for hearing before the Honorable J. E. Cass, Judge of the above-named Court, on January 27, 1992, at the Washington County Government Center, Stillwater, Minnesota.

Gerald S. Duffy, Esq., Wm. Christopher Penwell, Esq., and Anthony J. Gleekel, Esq., appeared on behalf of the Plaintiff. Pierre N. Regnier, Esq. and James G. Golembeck, Esq., appeared on behalf of the Defendant.

Based upon the files, records and the proceedings herein, the Court made its Order.

Now, Therefore, Pursuant to said Order;

IT IS HEREBY ADJUDGED, DETERMINED AND DECREED:

1. That Defendant's Motion to amend and for a new trial is DENIED.

2. That the parties have stipulated to stay the proceeding pending an appeal on the liability issue. A stay of the proceedings is GRANTED as follows:

a. Six (6) months from the date of the Order, Defendant City shall commence condemnation proceedings pursuant to this Court's Order;

b. Upon commencement of the condemnation proceedings, the parties may commence discovery on the issue of damages;

c. Discovery shall be completed within four (4) months of the filing of the Minnesota Court of Appeals decision on the issue of liability in this matter;

d. The Commissioners appointed by Order of this Court dated December 16, 1991, are hereby discharged from their duties as Commissioners;

e. Upon receipt of this Order, Commissioners Beedle, Kabis, and McKenzie shall submit their bill for services incurred in attending the swearing in ceremony to Pierre N. Regnier, Esq., 2100 Meritor Tower, 444

Cedar Street, St. Paul, Minnesota 55101, and such bill will then be paid by Defendant.

DATED: March 26, 1992
FILED: March 26, 1992

BY THE COURT

_____
Court Administrator

BY_____
Deputy

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF WASHINGTON TENTH JUDICIAL DISTRICT

Woodbury Place Partners, a Minnesota general partnership,

Plaintiff, JUDGMENT

vs.

FILE NO. CO-88-3249

City of Woodbury, Minnesota, a municipal corporation,

Defendant.

Pursuant to Judge Cass's Order dated December 16, 1991 and the Order dated January 22, 1992, on file herein,

IT IS HEREBY ADJUDGED, DETERMINED AND DECREED:

That a peremptory Writ of Mandamus shall issue directing Defendant, City of Woodbury, to commence condemnation proceedings against Plaintiff's property involved herein.

That said condemnation proceedings are hereby

stayed pursuant to the March 3, 1992 Order of the Court and the March 26, 1992 Judgment.

DATED: April 2, 1992
FILED: April 3, 1992

BY THE COURT

_____
Court Administrator

BY _____
Deputy

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF WASHINGTON — TENTH JUDICIAL DISTRICT

Douglas M. DeCoster, Steven C. DeCoster, and Woodbury Place Partners, a Minnesota general partnership,

Plaintiffs,

vs.

City of Woodbury, Minnesota, a municipal corporation,

Defendants.

FINDINGS OF FACT AND ORDER

File No. CO-88-3249

The above-entitled matter came on for hearing before the undersigned, the Honorable J. E. Cass, Judge of the above-named Court, at the Washington County Government Center, Stillwater, Minnesota, on April 20, 1990.

Gerald S. Duffy, Esq., appeared on behalf of Plaintiffs. Pierre N. Regnier, Esq., and James G. Golembeck, Esq., appeared on behalf of Defendant.

Based upon all of the files, records, and proceedings herein, the Court makes the following:

FINDINGS OF FACT

1. That Plaintiffs owned certain commercially-zoned property on Weir Drive, Woodbury, Minnesota, at the northwest corner of Interstate 494 and Valley Creek Road, as of July 29, 1988, the date of the initiation of this case.

2. That Plaintiffs desired to develop this property and submitted an application for a preliminary plat, site plan, and special use permit (Plan A) to Defendant City of Woodbury in February of 1988. The Woodbury City Council tabled this application.

3. That Plaintiffs revised Plan A and submitted the revised plan (Plan B) to the Woodbury Planning Commission and Woodbury Park Commission, both of whom recommended approval of Plan B in April of 1988.

4. That the Woodbury City Council passed Ordinance 1516 on March 23, 1988, pursuant to Minn. Stat. §462.355, subd. 4, which established a moratorium on development along Interstate 494.

5. That the Woodbury City Council, on June 8, 1988, tabled Plaintiffs' application for a variance from Ordinance 1516.

6. That Plaintiffs filed a Summons and Complaint on August 1, 1988, making claims that the Ordinance and governing statute were unconstitutional; that the Ordinance is invalid; that the moratorium did not apply to Plaintiffs' property; that Defendant's actions violated 42 U.S.C. §1983; that Defendant's actions

constituted a taking without just compensation; and asking for damages and abatement of real estate taxes.

7. That Plaintiffs filed an Amended Complaint on December 22, 1989, which dropped the claims regarding 42 U.S.C. §1983, taking, damages, and real estate taxes. The Amended Complaint requested only declaratory judgment regarding the remaining claims.

8. That on December 29, 1989, Plaintiffs Steven C. DeCoster and Douglas M. DeCoster entered into a Purchase Agreement with Plaintiff Woodbury Place Partners. Douglas M. DeCoster immediately conveyed all of this interest in the subject property to Woodbury Place Partners. Steven C. DeCoster conveyed all of his interest in the property to Woodbury Place Partners on January 3, 1990. Neither Steven C. DeCoster nor Douglas M. DeCoster have any interest in the property or in Woodbury Place Partners at this time.

9. That Ordinance 1516 expired on March 23, 1990. Defendant has moved for summary judgment, claiming that the expiration of the Ordinance has mooted Plaintiffs' request for declaratory judgment.

10. That Plaintiffs' request for declaratory judgment is moot.

11. That Plaintiffs have moved for leave to file an Alternative Writ of Mandamus and Second Amended Complaint, which re-asserts the 42 U.S.C. §1983, taking, damages, and real estate taxes claims.

12. That no prejudice will result to Defendant

by allowing Plaintiffs to amend their Complaint.

Based upon the foregoing, the Court makes the following:

ORDER

1. That Defendant's Motion for summary judgment is DENIED.

2. That Plaintiffs' Motion to file an Alternative Writ of Mandamus and Second Amended Complaint is GRANTED.

3. That Plaintiffs' Motion to delete Douglas M. DeCoster and Steven C. DeCoster as Plaintiffs is GRANTED. The new caption shall read: Woodbury Place Partners, a Minnesota general partnership, Plaintiff, v. City of Woodbury, Minnesota, a municipal corporation, Defendant.

4. That the Washington County Court Administrator shall serve a true and correct copy of this Order by U.S. mail upon counsel for the above-named parties, which shall constitute due and proper service of this Order for all purposes.

The attached Memorandum is made a part hereof by reference.

Dated: April 27, 1990

J. E. Cass
Judge of District Court

MEMORANDUM

Re: DeCoster, et al. v. City of Woodbury
Court File No. CO-88-3249

The above-entitled matter came before this Court upon Defendant's Motion for summary judgment and Plaintiffs' Motion for leave to file an Alternative Writ of Mandamus and Second Amended Complaint.

Minn. R. Civ. P. 15.01 states that a party may amend a pleading once before a responsive pleading is served, otherwise a pleading may be amended only by leave of court, with such leave freely given when justice so requires. Amendment is generally allowed unless the party opposing the amendment can show that prejudice will result from the amendment other than having to defend against an additional claim. Hughes v. Micka, 130 N.W.2d 505, 510 (1964). Other factors to be considered are the state of the proceedings, Envall v. I.S.D. #704, 349 N.W.2d 593, 597 (Minn. Ct. App. 1987), citing Tomilson Lumber Sales, Inc. v. J.D. Harrold Co., 117 N.W.2d 203, 207 (1962), and whether substantial delay will result, Envall, citing Hughes.

Defendant claims that Plaintiffs have changed the character of the lawsuit by asserting new claims. In essence, Defendant is merely stating that prejudice will result from having to defend against additional claims, which is not an adequate basis for showing prejudice under Hughes. Defendant also claims that undue delay will result and that Plaintiffs' Motion should be denied since a Note of Issue has already been filed. The Court finds, however, that no significant delay should occur. The

original Complaint, which made the same claims as the Second Amended Complaint, was filed on August 1, 1988. These were the claims which were subject to discovery for one year, until these claims were dropped in the Amended Complaint served on Defendant on September 19, 1989. It appears that much of the previously conducted discovery will be applicable to the re-asserted causes of action. Plaintiffs' Motion is, therefore, granted.

Defendant's Motion for summary judgment is denied in light of the allowed Second Amended Complaint.

Dated: April 27, 1990

J. E. Cass
Judge of District Court

STATE OF MINNESOTA

IN COURT OF APPEALS

C2-92-670

Washington County
District Court #C0883249

Lansing, Judge

Woodbury Place Partners,

Respondent,

Gerald S. Duffy
William Christopher Penwell
Anthony J. Gleekel
Siegel, Brill, Greupner & Duffy, P.A.
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vs.

City of Woodbury, Minnesota,

Appellant.

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Filed: November 17, 1992
Office of Appellate Courts

SYLLABUS

An interim moratorium enacted pursuant to Minn. Stat. § 462.355 which denies an owner all economically viable use of property for two years is not a categorical taking under the Fifth Amendment to the United States Constitution.

Reversed and remanded.

Considered and decided by Amundson, Presiding Judge, Lansing, Judge, and Peterson, Judge.

OPINION

LANSING, Judge

The City of Woodbury challenges the trial court's determination that, on its face, an interim moratorium on development effected a taking of property without just compensation. We reverse and remand.

FACTS

This appeal focuses on 505,533 square feet of unimproved land zoned for commercial use in the northwest corner of the intersection of Interstate 494 and Valley Creek Road in Woodbury, Minnesota. Woodbury Place Partners purchased an undivided one-half interest in the property, including all rights in this litigation, in December 1987, and in January 1990 purchased all remaining property rights. In January 1991 the partnership conveyed its interest in the property to a third party.

In March 1987 the City of Woodbury retained a corporate transportation consultant to conduct an access improvement study for I-494. Woodbury specifically directed the consultant to analyze existing congestion problems at the I-494 interchange at Valley Creek Road and to assess the need and possible locations for additional interchanges.

While the traffic flow study was pending, the partnership proceeded on plans to develop its property. In February 1988, the partnership applied to the city for approval of a preliminary plat, site plan and special use

permit for the construction of an 80,248 square foot retail center and an 18,344 square foot office building on the property. After discussions with city staff, the partnership revised its development plan to accommodate the consultant's proposed roadway improvements.

On March 23, 1988, the city council adopted an interim moratorium which prohibited acceptance or consideration of subdivision approval, site plan review, comprehensive plan amendments, or rezoning on undeveloped areas adjacent to I-494. Woodbury Ord. No. 1516. Conforming to the moratorium, the city council tabled the partnership's development applications. Between March 23, 1988, and the moratorium's expiration on March 23, 1990, Woodbury twice denied the partnership a variance.

In July 1988 the partnership brought this action alleging an unconstitutional taking. The partnership and the city agreed to submit the case on separately drafted sets of stipulated facts. Stipulation 47 submitted by the partnership states that they were denied all economically viable use of the property from March 23, 1988, to March 23, 1990, as a result of the moratorium. Stipulations 124 and 125 submitted by the city stated that the moratorium was reasonable and necessary to protect the planning process and to prohibit construction which could adversely affect road design and public health and safety.

The district court found that Woodbury's moratorium effected a compensable taking of the partnership's land from March 23, 1988 to March 23, 1990. Proceedings to determine damages have been stayed pending resolution of this appeal. The Metropolitan

Council and the League of Minnesota Cities have filed amicus briefs.

ISSUE

Does a two-year moratorium enacted pursuant to Minn. Stat. §462.355 which denies all economically viable use of property to protect a planning process constitute a compensable "taking" under the Fifth Amendment?

ANALYSIS

I.

The Fifth Amendment[1] provides that "private property [shall not] be taken for public use without just compensation." The essential purpose of this clause is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 123-124, 98 S.Ct. 2646, 2659 (1978) (quoting Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569 (1960)).

The takings clause originally was applied only to physical appropriations of property, but in 1922 Justice Holmes recognized that regulations on property will also be considered takings if they go "too far." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S.Ct. 158, 160 (1922). Just how far a regulation must go before it will be considered "too far" under the Fifth Amendment has not been specifically denied by formula or rule. Penn Central, 438 U.S. at 124, 98 S.Ct. at 2659. Consequently, judicial

---

[1]Although the partnership listed Article I, Section 13 of the Minnesota Constitution in its complaint, its brief and argument focused exclusively on federal case law.

determinations have relied on ad hoc factual inquiries and case-specific weighing of the competing public and private interests. Id.; Agins v. City of Tiburon, 447 U.S. 255, 261, 100 S.Ct. 2138, 2141 (1980).

The Supreme Court has identified factors to guide courts in ad hoc factual inquiries. The factors include: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government regulation. Penn Central, 438 U.S. at 124, 98 S.Ct. at 2659; Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225, 106 S.Ct. 1018, 1026 (1986). See Parranto Bros. v. City of New Brighton, 425 N.W.2d 585 (Minn. App. 1988) (restrictive zoning ordinance held not a taking after applying three-factor inquiry), pet. for rev. denied (Minn. July 28, 1988).

In addition the Supreme Court has recognized two categories of regulatory action that constitute compensable takings without a case-specific inquiry or balancing of public and private interests. Lucas v. South Carolina Costal Council, _____ U.S. _____, _____, 112 S.Ct. 2886, 2893 (1992). The first occurs when regulations compel owners to suffer physical invasion or occupation of their property. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164 (1982). The second occurs when the regulation "denies all economically beneficial or productive use of land." Lucas, ___ U.S. at _____, 112 S.Ct. at 2893.

The partnership, relying on Lucas and First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378 (1987), maintains that the

city's moratorium on development constitutes the second type of regulatory action and, therefore, the partnership is entitled to compensation without a case-specific inquiry or balancing of public and private interests. We do not read Lucas or First English to impose this result.

II.

In Lucas, the property owner purchased residential lots on the coast of South Carolina to build single family homes. Before Lucas developed the property, the state legislature enacted the Beachfront Management Act. The trial court found that the Act decreed a permanent construction ban which effectively deprived Lucas of any reasonable use of the lots and made them valueless. Lucas v. South Carolina Coastal Council, ___ U.S. ____, _____, 112 S.Ct. 2886, 2890 (1992). On the basis of these factual findings the Court applied the categorical rule that "total regulatory takings must be compensated." Id. at ___, 112 S.Ct. at 2899.

To invoke the total takings analysis of Lucas, the partnership relies exclusively on the stipulation that the moratorium denied all economically viable use of the property from March 23, 1988 to March 23, 1990.[2] We interpret the phrase "all economically viable use for two years" as significantly different from "all economically viable use" as applied in Lucas. The two-year deprivation of economic use is qualified by its defined duration. In Minnesota, moratoriums on development to aid planning

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[2]In our view the sale of the remaining one-half interest in the property during the moratorium would belie a determination of total economic inviability. However, we are obligated to accept the stipulation for purposes of our analysis.

processes cannot exceed thirty months. Minn. Stat. §462.355, subd. 4 (1990). This is significantly different from the presumptively permanent South Carolina regulation which imposed prohibitions on development. That the Woodbury property's economic viability was delayed, rather than destroyed, is implicitly recognized in the language of the stipulation. "[A]ll economically viable use from March 23, 1988 to March 23, 1990" recognizes that economic viability exists at the moratorium's expiration.

By narrowly defining the measurable property interest as a two-year segment, the partnership equates its loss of use to a "total" taking. Lucas acknowledges that the "rhetorical force" of the "no economically viable use" rule is "greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured." ____ U.S. at _____, 112 S.Ct. at 2894 n.7. However, the Supreme Court has repeatedly resisted attempts to narrowly define attributes of property ownership to show total deprivation of economic use through regulation.

> In Penn Central the Court explained that: "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel **as a whole** * * *.

438 U.S. at 130, 98 S.Ct. at 2662 (emphasis added).

Consistent with this construction, the Court declined to find a categorical taking in Andrus v. Allard, 444 U.S. 51, 100 S. Ct. 318 (1979), when a governmental regulation prohibited the owner from selling his property. The Court reasoned that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." Id. at 65-66, 100 S.Ct. at 327. This concept was aptly characterized by Justice Stevens in his dissent in First English:

> Regulations are three dimensional: they have depth, width, and length, * * * It is obvious that no one of these elements can be analyzed alone to evaluate the impact of a regulation, and hence to determine whether a taking has occurred.

482 U.S. at 330, 107 S.Ct. at 2394.

We acknowledge that no case has specifically addressed the dimension of length of time as it applies to the totality of a taking. Nonetheless the Supreme Court's inclination to measure the economic burden against the value of the property as a whole, rather than against discrete segments, compels us to reject the partnership's argument. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497, 107 S.Ct. 1232, 1248 (1987).

When measured against the value of the property as a whole, rather than against only a two-year time

frame, the moratorium did not deny the partnership "all economically viable use" of its property. Delaying the sale or development of property during the governmental decision-making process may cause fluctuations in value that, absent extraordinary delay, are incidents of ownership rather than compensable takings. Agins v. Tiburon, 447 U.S. 255, 263, 100 S.Ct. 2138, 2143 n.9 (1980).

III.

First English does not change this analysis. Although First English presented an issue dealing with the dimension of time in the context of a regulatory taking, we cannot apply its holding as broadly as the partnership urges. First English essentially held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321, 107 S.Ct. 2378, 2389 (1987).

The First English court expressly declined to decide whether a regulatory flood control ordinance prohibiting construction or reconstruction amounted to a taking. Id. at 313, 107 S.Ct. at 2384-85. On remand the California appellate court held that the interim "total moratorium" ordinance was by design a temporary measure which could not be a compensable taking. 210 Cal.App.3d 1353, 1372-73 (1989), cert. denied, 493 U.S. 1056 (1990).

First English does not create a new liability standard to determine when a "temporary" taking occurs,

but clarifies the appropriate remedy after a taking is recognized. It is uncertain whether the term "temporary taking" as employed by First English was even intended to apply to planning moratoriums. The opinion seems to presuppose that "temporary regulatory takings" means "regulatory takings which are ultimately invalidated by the courts." 482 U.S. at 310, 107 S.Ct. at 2383. The apparent reach of First English is to retrospectively temporary takings (e.g., regulations subsequently rescinded or declared invalid), not prospectively temporary regulations such as the Woodbury moratorium.[3]

Courts have uniformly construed the essential holding of First English narrowly. See Guinnane v. City and County of San Francisco, 197 Cal.App.3d 862, 869 (1987); McCutchan Estates Corp. v. Evansville-Vanderburgh County Airport Auth. Dist., 580 N.E.2d 339 (Ind. Ct. App. 1991) ("[T]here is nothing in First English which alters the established principle that the interim burden imposed on a landowner during the government's decision-making process, absent unreasonably delay, does not constitute a taking."), cert. denied., 488 U.S. 823 (1988). Because it has yet to be demonstrated that Woodbury's moratorium amounted to a taking; the remedial rule of First English that "temporary" takings must be compensated does not apply.

IV.

Woodbury's two-year moratorium did not deny the

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[3]Harvard Law Professor Frank Michelman has interpreted "the First English decision [as] not reach[ing] regulatory enactments, even total restrictive ones, that are expressly designed by their enactors to be temporary * * *." Frank Michelman, Takings, 1987, 88 Colum. L. Rev. 1600, 1621 (1988).

partnership "all economically viable use" of their property in the way that phrase has been conceived and applied by the Supreme Court. Consequently, the district court's determination that a categorical taking has occurred on these facts must be reversed.

The three-factor inquiry of Penn Central, rather than the categorical rule of Lucas, applies to determine whether a compensable taking occurred. Although the stipulations submitted by the parties shed light on the character of the moratorium, they do not resolve the extent to which the regulation interfered with distinct investment backed expectations or the magnitude of the economic impact on the partnership. Consequently, we do not decide on this record whether a compensable taking has occurred under the standards established in Penn Central and Agins. This question is appropriately resolved on remand.

DECISION

The district court erred in concluding that Woodbury's two-year moratorium constituted a categorical taking. We remand to the district court for further proceedings to determine whether the moratorium effected a compensable taking.

Reversed and remanded.

Signed by: Judge Harriet Lansing
November 10, 1992

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Sindy L. Campos of the City of Plymouth, County of Hennepin, State of Minnesota being duly sworn says that on the 16th day of December, 1992, she served the annexed Petition for Review of the Decision of the Court of Appeals on Robert H. Freilich and Richard G. Carlisle by federal expressing to them two copies thereof enclosed in an envelope, postage prepaid and by depositing same in the post office at Minneapolis, Minnesota directed to said attorneys at Freilich, Leitner, Carlisle & Shortlidge, 1000 Plaza West, 4600 Madison, Kansas City, Missouri 64112, the last known address of said attorneys.

_____
Sindy L. Campos

Subscribed and sworn to before
me this 16th day of December, 1992.

_____
Notary Public

STATE OF MINNESOTA
IN SUPREME COURT

C2-92-670

Woodbury Place Partners,
Respondent,

vs.

City of Woodbury, Minnesota,
Appellant.

O R D E R

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Woodbury Place Partners and the conditional petition of the City of Woodbury for further review be, and the same are, denied.

IT IS FURTHER ORDERED that the requests of the Metropolitan Council and the League of Minnesota Cities to serve and file briefs as amici curiae be, and the same are, accordingly denied.

Dated: January 15, 1993
Filed on January 15, 1993

BY THE COURT:

_____
Chief Justice

Supreme Court, U.S.
FILED
MAY 12 1993
OFFICE OF THE CLERK

No. 92-1644

In The

Supreme Court of the United States

October Term, 1992

WOODBURY PLACE PARTNERS,
a Minnesota General Partnership,

Petitioner,

vs.

CITY OF WOODBURY, a Minnesota
Municipal Corporation,

Respondent.

Petition For Writ Of Certiorari To The State Of Minnesota Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Counsel for Respondent suggest that the question presented by Petitioner is a misstatement of the Question Presented in this case. Pursuant to Rule 24.2 of the Supreme Court Rules, Respondent respectfully offers the following Question Presented:

> IF A DEVELOPER AND GOVERNMENTAL BODY STIPULATE THAT TEMPORARY DENIAL OF ALL ECONOMICALLY VIABLE USE IS REASONABLE IN SCOPE AND DURATION - AND WHERE THERE IS NO EVIDENCE OF TEMPORARY OR PERMANENT ECONOMIC HARM OR DIMINUTION IN VALUE - DOES THAT CONSTITUTE A *PER SE* TAKING UNDER *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*, ___ U.S. ___, 112 S.Ct. 2886 (1992)?

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No. 92-1644

In The

Supreme Court of the United States

October Term, 1992

WOODBURY PLACE PARTNERS,
a Minnesota General Partnership,

Petitioner,

vs.

CITY OF WOODBURY, a Minnesota
Municipal Corporation,

Respondent.

Petition For Writ Of Certiorari To The State Of Minnesota Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully asks that the Writ of Certiorari requested by Petitioner be denied.

STATEMENT OF THE CASE

Petitioner states that the City's 24 month interim development moratorium "denies a property owner of all economically viable use of its property . . . " constituting a per se categorical taking of property under this Court's recent decision in *Lucas v. South Carolina Coastal Council,*

___ U.S. ___, 112 S.Ct. 2886 (1992). Petition pg. 3. Contrary to Petitioner's assertion, the parties in this case stipulated that denial of all economically viable use for two years was reasonable in scope and duration. (Stipulated Findings, [Petitioner's Version], No. 47; and, Stipulated Findings, [Respondent's Version], Nos. 124 and 125). Further, there was no stipulation or evidence in this case of economic harm or diminution in *the temporary or permanent value* of the developer's property caused by the moratorium.

In 1980, the City's Comprehensive Plan identified the need for access to Interstate 494 (I-494) in the vicinity of property owned by Douglas and Steven DeCoster. In 1987, Petitioner purchased an undivided one-half interest in the DeCoster land[1]. In early 1988, a transportation consultant reported that traffic safety problems caused by growth in the area would seriously worsen traffic congestion and recommended that several new interchanges be constructed to accommodate existing and future traffic demands. (Defendant's Findings Nos. 15, 16). In accordance with law, a period of study, negotiations and discussions with over 40 federal, state, regional and local agencies commenced regarding amendment of the City's

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[1] Contrary to Petitioner's Statement of the Case, Petitioner has not been the owner of the Property here involved at all relevant times. Twenty months after enactment of the moratorium (while the interim ordinance was still in effect), Petitioners purchased the DeCosters' remaining interest in the land. Moreover, in January 1991 Petitioners sold the Property to a third party for an undisclosed sum. (Plaintiff's Findings, Nos. 3-6).

Comprehensive Plan to provide new access to I-494. Careful study of impacts of the project on nearby elementary and junior high schools, on adjacent wetlands, traffic safety and capacity, church property (among many other issues) ensued. (Defendant's Findings, Nos. 11, 31, 39, 40, 44, 45, 54, 57, 65, 72, 74, 77).

To prevent premature development during the studies and environmental assessments, which might destroy and frustrate the proper implementation for the health, safety and welfare of the corridor intersection location, the City enacted Ordinance No. 1516 to impose a temporary moratorium on development in the I-494 corridor which would have a negative impact on the planning process. Ordinance No. 1516 was expressly authorized by Minn. Stat. § 462.355(4) (1990) which provided for such moratoria for a period not to exceed 30 months.[2] Pursuant to the mandates of state law and by its own terms, the interim moratorium ordinance expired on March 23, 1990. During the study period, the final alignment for the new interchanges and access roads was fully planned and improved the access along the westerly edge of Petitioner's Property. (Defendant's Findings, No. 95).

The parties stipulated that: (1) Petitioner was necessarily and reasonably denied all economically viable use

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[2] Originally, Petitioner challenged the constitutionality of this statute, but later abandoned the claim. The City suggests that abandonment of that claim moots any viable challenge to a moratorium authorized by that statute. (Defendant's Findings, Nos. 115, 121). This is particularly true where the existence of that statute on the date Petitioner acquired the property defined Petitioner's property interest. *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 2899-2901 (1992).

of its property for two years as a result of the moratorium; (2) Petitioner was not singled out under the moratorium (Defendant's Findings Nos. 110, 114, 115, 118, 119, 121, 123, 124 and 125; and Plaintiff's Findings No. 47); (3) the ordinance was enacted properly and in conformance with all statutes and ordinances. (Defendant's Findings No. 111); (4) the ordinance was of limited duration, enacted in good faith, without discrimination and was not improperly prolonged (Defendant's Findings No. 114); (5) the moratorium was necessary for coordination between all of the governmental agencies involved in the studies from 1986 to 1991 (Defendant's Findings No. 118); (6) the ordinance was necessitated by a large traffic study directly related to the Comprehensive Plan of the City, and was directly related to official controls of the City, such as zoning maps, transportation maps, site plan review, and plat applications; and (7) the ordinance was necessary to protect the public health, safety and welfare (Defendant's Findings No. 125).

Petitioner sought an Alternative Writ of Mandamus in July 1988, compelling Respondent to institute condemnation proceedings. The district court ordered the Respondent to institute condemnation proceedings. On appeal, the Minnesota Court of Appeals noted that Petitioner had totally and simply relied on a stipulation that the ordinance denied all economically viable use of the property for two years; and, that such stipulation was significantly different from the concept of deprivation of "all economically viable use" as applied in *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 2890 (1992). (App. A-31). The Court further held:

> The two-year deprivation of economic use is qualified by its defined duration. In Minnesota, moratoriums on development to aid planning processes cannot exceed 30 months. Minn. Stat. § 462.355, subd. 4 (1990). This is significantly different from the presumptively permanent South Carolina regulation which imposed prohibitions on development.

(App. A-31-32).

> When measured against the value of the property as a whole rather than only a two year time frame, the moratorium did not deny the partnership "all economically viable use" of its property. Delaying the sale or development of property during the governmental decision-making process may cause fluctuations in value that, absent extraordinary delay, are incidents of ownership rather than compensable takings.[3]

(App. A-33-34) (citing *Agins v. Tiburon*, 447 U.S. 255, 263 n.9, 100 S.Ct. 2138, 2143 n.9, 65 L.Ed.2d 106 (1980)).

Thus, the Court of Appeals held that Petitioner's economically viable use was merely delayed, rather than taken. (App. A-32).

Accordingly, the Court held that the City's moratorium did not deny Petitioner "all economically viable use" of their property in the way that phrase has been conceived and applied by the Supreme Court; and,

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[3] Following the decision in *Lucas*, this Court denied certiorari in the case of *Tull v. Commonwealth of Virginia*, ___ U.S. ___, 113 S.Ct. 191 (1992), which squarely presented the question of whether a taking inquiry may focus on a portion of the property regulated as opposed to the property as a whole.

remanded for further consideration of this case under the ad-hoc multi-factor standards established in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), and *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

The case is currently pending on remand and no opinion by Minnesota's state court of last resort on the remand has yet been issued.

REASONS FOR GRANTING THE WRIT

SUMMARY OF THE ARGUMENT

Pursuant to Rule 10 of the Supreme Court Rules, strong considerations exist in this case to *deny* review on Writ of Certiorari. There is no conflict on the issue here involved in the circuits. There has been no decision by Minnesota's state court of last resort which in fact, refused a writ of review. This case itself is inchoate in that it is currently still being litigated in the state courts. The intermediate decision in this case is not in conflict with any decision of the U.S. Supreme Court or, for that matter, with any other federal decision. A review of the Petition for Writ of Certiorari shows that no claim is made by Petitioner to the contrary.

Instead, Petitioner seeks to bootstrap a phrase, which in and of itself has no meaning, from one of many stipulations in this case. Petitioner's version of the stipulated findings of fact in this case was to the effect that the moratorium here involved denied Petitioner "all economically viable use of the Property for two years." (Petition, pg. 7; Petitioner's Findings, No. 47). In every proceeding in this case, Petitioner has sought to elevate the semantics

of this one phrase, standing alone, over the substance of all of the stipulations taken together.

Reduced to its simplest terms, Petitioner's argument has always been that the phrase "all economically viable use . . . for two years" has some talismanic effect upon its cause of action. It matters not, according to Petitioner, whether or not the *value* of the Property diminished[4] during the period of time the moratorium was in effect, only that the *use* was affected for the two years.

Because this case was submitted on stipulations which, when taken together, establish that the temporary denial of use (a) was reasonable in duration and scope, (b) caused no economic harm, and (c) caused no diminution in value of the Property, this case presents no important question of federal law which has not been, but should be, settled by this Court.

The Decision Of The Minnesota Court Of Appeals Does Not Raise An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

This case involves careful transportation planning for new access to an interstate highway. At this stage of the proceedings, the record does not reveal whether or not

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[4] *See* D. Callies & C. Duerksen, *Value Recapture as a Source of Funds to Finance Public Projects*, 8 Urb. L. Ann. 73, 74 (1974) ("privately-owned land near transit stations and stops will probably increase in value due to the enhanced commercial, industrial and residential development potential created by superior access and the concurrent generation of intense local activity.")

economic harm or windfall profits to the developer were the result of that planning. To date, the record in the case at hand reveals only a temporary interference with the *use* of the Property. There has been no showing of the impact of the ordinance on the *fair market value* of the Property or the extent to which the ordinance interfered with the Petitioner's reasonable investment-backed expectations.

The record does reveal that the Petitioner reaped the economic benefits of improved access in the I-494 corridor and that the Petitioner was able to sell its property during the moratorium for an undisclosed sum (presumably for a profit). (Petitioner's Findings Nos. 3-6). The parties have stipulated that the temporary denial of all economically viable use here involved was reasonable in scope and duration. (Respondents' Findings Nos. 95, 110, 111, 114, 115, 118, 119, 121, 123, 124 and 125; and, Petitioner's Findings No. 47).

Beyond peradventure, there is no "great debate" as to the constitutionality of an ordinance under the Fifth Amendment which creates windfall profits for a developer and is not unfair or arbitrary. Petitioner cites Sax, *Takings in the Police Power,* 74 Yale L. J. 36, 60 (1964); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 Harv. L. Rev. 1165, 1192 (1967); Bozung & Alessi, *Recent Developments in Environmental Preservation and Rights of Property Owners,* 20 Urb. Law. 969 (1988); Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto,* 9 Vermont L. Rev. 193 (1984) in an attempt to show the dimensions of a debate on the issues involved in this case.

In fact, a review of the sources cited reveals from Petitioner's own authorities that no debate exists over the Question Presented when the stipulations are read as a whole. *See* Question Presented, *supra*.

For example, Professor Sax states:

> The more one examines these early explanations of the constitutional purpose of the taking provision, the clearer it becomes that the protection afforded is most properly viewed as a guarantee against unfair or arbitrary government. Story, for example, stated that the compensation provision, "is laid down by jurists as a principle of universal law [because] in a free government, almost all other rights would become worthless, if the government possessed an *uncontrollable* power over the private fortune of every citizen."

Sax, 74 Yale L.J. at 60 (citations omitted) (emphasis in original). By stipulation in the case at hand, we know that the ordinance was not "unfair or arbitrary" and that it did not have an adverse impact upon the "private fortune" of the Petitioner.

Professor Michelman, with language that foreshadowed *Lucas* stated:

> Is the supposedly critical factor the size of the private loss absolutely, or rather the size of that loss compared with some other quantity? And if, as seems clear, a comparison of magnitudes is intended – a comparison in which, were it fractionally expressed, the loss in value of the affected property would compose the numerator – what value supplies the denominator? Is it the preexisting value of the affected property, or is it the whole preexisting wealth or income of the complainant?

Michelman, 80 Hav. L. Rev. at 1192 (1967).

Thus, Professor Michelman speaks of value (not mere temporal use disassociated from value) as the key concept in the equation. This case involves no evidence of diminution in value or economic harm; therefore, it can shed no light on any great debate as to what proportion of value in property may be destroyed by government regulation without payment of just compensation. Compare *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 125-126 (1978) (showing of "economic harm" not merely a lack of economic use required).

Similarly, the Bozung article and the *White River Junction Manifesto* merely emphasize that fluctuations in value caused by reasonable delays in governmental decision-making do not constitute takings[5]. In the case at hand, we do not know whether value fluctuated or not; however, we do know that the delay in economically viable use was reasonable.

There is certainly no "great debate" about whether or not the separation of powers doctrine still exists; and, as long as it does, municipal legislation, including the ordinance here at issue, will enjoy a presumption of validity. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Likewise, there is no debate that the taking question "necessarily

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[5] "Mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.' " *Agins v. Tiburon*, 447 U.S. 255, 263 n. 9 (1980) (citing *Danforth v. United States*, 308 U.S. 271, 285) (remaining citations omitted). *Accord 1902 Atlantic Limited v. United States*, 26 Cl. Ct. 575 (1992); *Smith v. Wolfeboro*, 615 A.2d 1252 (N.H. 1992), and *Bell v. City of Waco*, 835 S.W.2d 211, 215 (Tex. Ct. App. 1992).

requires a weighing of private and public interests." *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980). Petitioner, by failing to submit evidence of economic harm, clearly did not raise any issue over which there could be much debate.

First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987) and, *Lucas*, 118 S.Ct. 2886, do not stand for the propositions presented in this petition and, do not rescue Petitioner from its failure to meet its burden. *First English* reached merely the "remedial question" of whether or not the Fifth Amendment mandated the payment of just compensation in the event that there was a temporary taking. 482 U.S. at 303, 312-313. After remand, as we respectively suggest should be the case here, the Supreme Court denied certiorari where the ultimate issue and question presented was whether a reasonable delay in use could be a taking[6].

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[6] This fact is borne out by the decision of the California Court of Appeals in the *First English* remand, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (1989), *cert. denied*, 493 U.S. 1056 (1990). There the court found that, on balance, the moratorium was reasonable and therefore not a taking. *First English*, 210 Cal. App. 3d at 1367-69, 258 Cal. Rptr. at 902-03. Following this Court's opinion in *First English*, many courts have upheld validly enacted development moratoria and interim development ordinances against taking challenges. *See e.g., Jackson Court Condominiums v. City of New Orleans*, 874 F.2d 1070 (5th Cir. 1989); *S.E.W. Friel v. Triangle Oil Co.*, 543 A.2d 863 (Md. 1988); *Schafer v. City of New Orleans*, 743 F.2d 1086 (5th Cir. 1984); *Lockary v. Kayfetz*, 908 F.2d 543 (9th Cir. 1990), *rehearing denied*, 917 F.2d 1150 (9th Cir. 1990); *Zilber v. Town of Moraga*, 692 F. Supp. 1195 (N.D. Cal. 1988); *McCutchan Estates Corp. v. Evansville-Vanderburgh County Airport Auth. Dist.*, 580 N.E. 2d 339 (Ind. App. 1991); *Dufau v. United States*, 22 Cl. Ct. 156 (1990), *aff'd*, 940 F.2d

Lucas, contrary to Petitioner's assertions, did not somehow invite re-examination of the settled issue that taking claims do not arise when reasonable legislation is passed that has no discernable impact on the value of property. Repeatedly, throughout his opinion, Justice Scalia emphasized the draconian prohibitions of the Beachfront Management Act and its "complete extinguishment of property value. . . . " The Act "[r]ender[ed] them valueless." Repeatedly, Justice Scalia made clear that the taking issue was implicated only where legislation rendered property "valueless." 112 S.Ct. at 2895. Justice Scalia refused to entertain any argument (as addressed in the dissents) that "valueless" did not mean "valueless." *Id.* at 2896, n. 9. Finally, in footnote 7, emphasized at page 13 of the Petition, Justice Scalia stated that it is the "loss of *value*" in a given "property interest" that is critical to a determination of whether or not a *per se* taking exists. *Id.* at 2894.

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677 (Fed. Cir. 1991); and *New Jersey Shore Builders Assoc. v. Township of Middletown*, 561 A.2d 319 (N.J. A.D. 1989). Similarly in two specific cases after *First English* this Court has refused to grant certiorari where the question presented squarely raised the issue that a temporary moratorium for periods ranging from eighteen months to five years constituted a compensable taking. *Tocco v. N.J. Council on Affordable Housing*, 576 A.2d 328 (N.J. 1990), *cert. denied*, 122 N.J. 403, 585 A.2d 401 (N.J. 1990), *cert. denied*, 111 S.Ct. 1389 (1991) (moratorium completely freezing land for eighteen months constitutes a temporary taking); *First English*, after remand (five year moratorium until study completed and permanent ordinance adopted constitutes a temporary taking). See also *Guinane v. City and County of San Francisco*, 197 Cal. App. 3d 862, 241 Cal. Rptr. 787 (1987), *cert. denied*, 488 U.S. 823 (1988).

Perhaps another day in another case as the circuits continue to apply *Lucas* a case may come before this Court where property was rendered temporarily "valueless" and where the regulation was not limited upon passage and by state statute to a reasonable duration and scope. However, this is not such case.[7]

CONCLUSION

Petitioner states that the underlying inquiry to determine compensability under the takings clause is whether

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[7] None of the cases decided after the *Lucas* decision even remotely suggest that the lower courts are having any trouble interpreting Justice Scalia's "loss of value" standard for determination of whether or not, by categorical rule, there is a taking. *See, e.g., Naegele Outdoor Advertising, Inc. v. City of Durham,* 803 F. Supp. 1068 (M.D.N.C. 1992) (although the court found significant economic loss, no taking found where there was no physical invasion and some economic value remained); *Berrios v. City of Lancaster,* 798 F. Supp. 1153 (E.D. Pa. 1992) (court must review economic impact of regulation); *McAndrews v. New Bank of New England,* 796 F. Supp. 613 (D. Mass. 1992) (no taking where "no transfer of wealth from the plaintiff to the public domain"); *Tabb Lakes, Inc. v. United States,* 26 Cl. Ct. 1334 (1992) (evidence of substantial economic activity defeated taking claim); *Fitzgarrald v. City of Iowa City,* 492 N.W.2d 659 (Iowa 1992) (no taking where remaining value for property found); and *Powers v. Skagit County,* 835 P.2d 230 (Wash. Ct. App. 1992) (if regulation merely diminishes economic viability taking inquiry reverts to balancing of interests test, not *Lucas* test). If no showing of "loss of value" is required, the federal courts will find themselves reviewing every garden variety zoning disposition as a "super planning commission". We respectfully suggest that absent such a showing, merely local political issues are raised which should not be reviewed by the federal courts.

"some people bear public burdens which in all fairness and justice, should be borne by the public as a whole," citing *First English*, 482 U.S. at 318. We consider Petitioner's statement paradoxical in the extreme where Petitioner has stipulated to the "fairness and justice" of the ordinance at issue in this case (Defendant's Findings, Nos. 110, 114, 115, 118, 119, 121, 123, 124 and 125; and Plaintiff's Findings No. 47) and has carefully avoided offering any evidence of economic harm. We do, however, agree with Petitioner – and with Professor Sax and Michelman – that the "fairness and justice" standard pervades every case under the Fifth Amendment. Here, however, because that issue was settled in Respondent's favor, the decision of the Minnesota Court of Appeals does not raise an important question of federal law.

For the reasons set forth above, Writ of Certiorari should be denied in this case.

Respectfully submitted,

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